No. 03-939

Supreme Court, U.S.
FILED
FEB 3 - 2004
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In The
# Supreme Court of the United States

VICTOR DIAZ, CHARLES ROUNTREE, ROY EDWARD CLINE, RICHARD WEBB HARRIS, MITCHELL PHEFFER, PHILLIPE RICHARD, CLAYTON HORSCHELL, SHANE BRENT RICHINS, ARTHUR BOETTGER, TIMOTHY NOBLE, ORDWAYNE P. CHAUVIN, AND GUILLERMO CARRIZALES-CORTES,

*Petitioners,*

v.

J. RAY McDERMOTT, S.A., McDERMOTT INTERNATIONAL, INC., THE AMERICAN BUREAU OF SHIPPING, INC., CCC FABRICACIONES Y CONSTRUCCIONES, CORPORACION DE INDUSTRIAS CONSTRUCCIONES S.A. de C.V., GEO-TECHNICAL SERVICES, INC., NORTH BANK TOWING CORP., and SEABULK OFFSHORE, LTD.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

When a seaman chooses to file an action under the Jones Act, 46 U.S.C. §688, in a Louisiana state court and requests a jury on the main demand, may the District Judge, pursuant to Louisiana procedure, hear evidence and decide an exception of *res judicata* in a separate, judge trial?

## STATEMENT REGARDING PARTIES

Petitioners are named in the caption.

Respondents, CCC Fabricaciones y Construcciones ("CCC") and Corporacion de Industrias Construcciones S.A. de C.V. ("CIC") are represented by undersigned counsel and hereby submit this Brief in Opposition to Petition for Writ of Certiorari. Pursuant to U.S.S.C. Rule 29(6), CCC advises that it has no parent corporation. CCC is the parent of CIC. No publically held company owns 10% or more of the stock of either CCC or CIC.

Respondents, McDermott International, Inc. and McDermott Underwater Services, Inc., listed as Respondents to Petitioner's Petition for Writ of Certiorari, are represented by separate counsel and are filing a separate Brief in Opposition to Petition for Writ of Certiorari.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents CCC Fabricaciones y Construcciones, S.A. de C.V. ("CCC") and Corporacion de Industrias Construcciones, S.A. de C.V. ("CIC"), respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Louisiana Court of Appeal, Fourth Circuit, attached to the Petition as Appendix A, at App. 1.

## JURISDICTION

On April 22, 2003, the Louisiana Court of Appeal, Fourth Circuit, entered an Order denying petitioners application for a writ of certiorari. Attached to the Petition as Appendix A, at App. 1. On September 26, 2003, the Louisiana Supreme Court denied an application for discretionary review. Order denying writ attached to the Petition as Appendix B, at App. 3.

The Order of the Louisiana Supreme Court merely says that the application for writ of certiorari to the Louisiana Court of Appeal, Fourth Circuit, is denied and makes no comment on the merits. As the Louisiana Supreme Court merely denied petitioners application for writ, the present issue regarding the propriety of a trial to the district court of an exception of *res judicata* may be raised on appeal, after final judgment. Accordingly, the Order is not a final judgment or decree of Louisiana's highest court, and this Court does not have jurisdiction to grant the petition for writ of certiorari. 28 U.S.C. §1257(a).

Respondents understand that McDermott will address jurisdiction in greater detail.

## STATEMENT OF THE CASE

### A. Factual Background

The incidents giving rise to this lawsuit occurred in October of 1995, when the DLB-269 sank off the coast of Mexico during Hurricane Roxanne. Respondent, CCC Fabricaciones y Construcciones S.A. de C.V. (hereinafter "CCC"), a Mexican corporation, was the owner and operator of the DLB-269, and, at the time, was laying an offshore pipeline for Pemex, the Mexican national oil company. Respondent, Corporacion de Industrias Construcciones, S.A. de C.V. ("CIC"), provided labor to CCC and was the employer of Mr. Carrizales. Respondents, McDermott International, Inc. and McDermott Underwater Services, Inc.,[1] provided dive crews which assisted the DLB-269 in laying pipe on the floor of the Bay of Campeche, and the remaining petitioners were members of the dive crew. After the DLB-269 sank, 248 crew members, including all of the petitioners, were rescued at sea and brought to shore.

Shortly thereafter, each of the McDermott plaintiffs was provided travel expenses and flown back to the United States. On October 27, McDermott held a meeting with its employees in New Orleans to discuss possible settlement

[1] It is unclear whether petitioners have named the correct McDermott corporations. This issue will be addressed by counsel for the McDermott respondents.

of their claims and hosted a banquet to celebrate their safe return. The meeting was called by Don Terry, Manager of McDermott's Diving Division, after he had received several separate inquiries regarding settlement. At the meeting, Don Terry addressed the dive crew and informed them that McDermott would arrange for psychological counseling that any of the crew felt was needed as a result of their experiences during Hurricane Roxanne. During the presentation, Terry informed the men that he had been granted authority by McDermott to discuss the possibility of settlement with any of the divers who had not been physically injured. Terry never threatened any of the divers that a failure to settle would result in their firing. After his presentation, Terry left the divers to meet privately among themselves. The divers selected a spokesman, who proposed their initial settlement demand to Terry. Terry rejected the initial figure as too high, and he suggested that they end talk of settlement and proceed with the banquet.

In the meantime, however, the divers learned from another McDermott spokesman that McDermott's insurance deductible was $1.5 million, and they surmised that McDermott would pay this amount, or $75,000 to each of the McDermott diving related personnel. Shortly thereafter, the crew's spokesman approached J.J. Riddle of McDermott and asked whether McDermott would be willing to pay $75,000 to each member of the twenty-man dive crew. After consulting with Terry, Riddle advised the men that McDermott would be willing to pay $75,000 to each man. After arrangements were made to meet with McDermott's attorneys the following day, the settlement discussions ended.

Later that evening, McDermott hosted the survival celebration for the dive crew as scheduled. The following day, ten members of the dive crew reported to McDermott's office for the express purpose of settling their claims against all of the defendants in this matter. That day, October 28th, six of the petitioners herein met individually with an attorney provided by McDermott at which time a detailed explanation of seaman's rights was given to each. After receiving a full explanation of their rights, including an explanation that a lawsuit could result in substantial awards, these six petitioners settled their claims for $75,000 each.[2] Each meeting was recorded on videotape.

The videotapes establish that each petitioner was advised of his right to independent counsel and his right to bring suit against McDermott, CCC, or any other entity involved in the sinking of the DLB-269. Each petitioner verbally acknowledged his understanding of his physical and emotional condition. Each was advised that he had a right to recover damages for physical and emotional injuries. Moreover, each petitioner clearly was advised that the release encompassed all present or future injuries, whether then known or later discovered. Each petitioner was advised that he was under no obligation to settle and that he should not do so if he had any hesitation or doubt. Each petitioner was given ample opportunity to ask any question about any aspect of his legal rights, the terms of the settlement, or the actual release document.

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[2] Ordwayne P. Chauvin received $85,000.00 because he also had a minor physical injury.

It is evident from the videotapes that the petitioners were neither intoxicated nor otherwise mentally impaired. To the contrary, the behavior of the petitioners on the videotapes proves that each was coherent, had a complete understanding of what he was doing, and freely entered into the settlement agreement presented to him. Each acknowledged under oath that he, with a full understanding of his legal rights and physical and emotional condition, was voluntarily settling his claim against McDermott, CCC, and all other potential parties. Finally, each received the settlement funds and executed a written receipt and release and a confirming affidavit.

Five of the other petitioners settled their claims in much the same manner, albeit at later dates. Like the first six, each of the five men that settled later was placed under oath and acknowledged a full understanding of his legal rights as well as his physical and emotional condition. Again, each man stated that he had read and understood the settlement agreement and that he was voluntarily settling his claims against McDermott, CCC, and any other potential party. Each settlement was confirmed by a written receipt and release and accompanying affidavit.[3]

The situation with respect to Mr. Carrizales is similar. After being rescued, he returned to his home in Mexico. Later, Mr. Carrizales met with representatives of CCC where he accepted a settlement of his claims. Mr. Carrizales signed

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[3] Ronald Rozmarynowski was a member of the dive crew and a plaintiff below, but he did not agree to settle his claim and did not execute a release. He is not a petitioner in this court.

this settlement and release in court in the presence of a Mexican judge, who approved the settlement in accordance with Mexican civil procedure. This settlement, approved by the court, constitutes a judgment of a foreign court and thus, under the doctrine of comity, must be respected by American courts. Respondents deny the bald allegation that Mr. Carrizales was in any way physically threatened into signing his settlement and release.

In short, all of the petitioners executed valid and binding releases in which they relinquished all claims that they may have had against McDermott, CCC, or any other potential defendants. Consequently, each of the twelve petitioners is barred from bringing claims against the respondents in this action.

**B. Procedural History**

In spite of having signed releases, petitioners filed suit under the Jones Act, 46 U.S.C. §688, in Civil District Court in Orleans Parish, Louisiana. Petitioners chose Louisiana state court and, therefore, chose Louisiana state procedure. Earlier in this case, respondents filed motions for summary judgment on the validity of the releases, which were granted by the trial court. On appeal by the petitioners to the Louisiana Fourth Circuit Court of Appeal, the case was remanded to the trial court for further fact finding on the issue of the validity of the releases. Opinion attached to the Petition as Appendix D, at App. 7; *Coto v. J. Ray McDermott, S.A., et al.*, 772 So.2d 828 (La. App. 4th Cir. 2000).

A jury trial of the main demand was set in April 2002 but continued when, on the eve of trial, petitioners' counsel held a press conference, which clearly was designed to

influence the jury pool. A jury trial of the main demand was set for a second time on September 9, 2002, and was scheduled to last six weeks; however, over a month later only three witnesses had testified. This caused the jury to become antagonistic. When there was a dispute over an alleged comment attributed to an attorney for one of McDermott's excess insurers, the Honorable Marvin F. Gahagan, judge *ad hoc*, granted McDermott's and CCC's motions for mistrial. The Louisiana Fourth Circuit reversed the mistrial, but the Louisiana Supreme Court reinstated the ruling of the trial court by order dated October 18, 2002, No. 2002-CC-2585.

Judge Gahagan then recused himself and, thereafter, the Louisiana Supreme Court appointed the Honorable Gerald Federoff to sit as judge *ad hoc* for the duration of the case. The second trial had been set for six weeks and was running behind even this extended schedule. Given the history of this case and the burden it has put on the trial judges and jurors of the Civil District Court in New Orleans, Judge Federoff suggested that respondents notice their previously filed peremptory exceptions of *res judicata*, for separate evidentiary hearing. This is a procedure provided by La. C.C.P. arts. 927, 929, and 931 and is heard by the judge. In Louisiana procedure, the peremptory exception is a form of gate keeper. A ruling in favor of respondents would avoid a trial of the main demand and save substantial judicial resources and juror time;[4] on the

[4] Granting respondents' peremptory exception of *res judicata* would end this litigation as it concerns 12 of the 13 plaintiffs from the case below. The remaining litigation involving the claim of Ronald Rozmarynowski, who did not sign a release, would take substantially less time than a jury trial of the claims of all 13 plaintiffs.

other hand, a ruling in favor of petitioners would establish that the case merits a full jury trial on the main demand.

After both parties submitted briefs, on January 22, 2003, Judge Federoff entered Reasons and Order setting the exceptions for trial. Reasons and Order attached to the Petition as Appendix C, at App. 5. In the Reasons and Order, Judge Federoff stated unequivocally that the federal substantive maritime law applies to the validity of the seamen's releases, and correctly decided that the state procedural law is applicable when it does not interfere with the substantive maritime law. Finding no substantive interference, he ordered that the respondents' exception of *res judicata* be heard by the court without a jury.

Immediately thereafter, petitioners sought writs from the Louisiana Fourth Circuit, and, on April 22, 2003, the Louisiana Fourth Circuit upheld Judge Federoff's order setting the exceptions for trial. Opinion attached to the Petition as Appendix C, at App. 1. Petitioners then sought writs from the Louisiana Supreme Court, which were denied on September 26, 2003. Order attached to the Petition as Appendix B, at App. 3. Subsequently, petitioners have filed their petition for writ of certiorari to the Louisiana Fourth Circuit Court of Appeals with this Court.

## REASONS FOR DENYING THE PETITION

The trial court, affirmed by the Louisiana Fourth Circuit Court of Appeals, correctly held that, when a seaman elects to bring his action under the Jones Act, 46 U.S.C. §688, in state court, the determination as to the validity of a seaman's release is subject to state rules of procedure.

Under the Louisiana Code of Civil Procedure, when a plaintiff has executed a valid release, his cause of action may be dismissed on an peremptory exception of *res judicata*. La. C.C.P. art. 927. This exception is tried to the court, without a jury, and before the main demand. La. C.C.P. arts. 929, 931. The exception is a gate keeping device and is consistent with the seaman's right to jury trial on the main demand. *Shell Oil Company v. Kennedy,* 344 So.2d 1153 (La. App. 4th Cir. 1977).

Trial of the exceptions also is consistent with the Savings to Suitors Clause, 28 U.S.C. §1333(1), and the Jones Act, 28 U.S.C. §688, because this Court traditionally has granted the states wide latitude in applying their *procedural* rules to maritime cases in state court and because the trial of the exceptions does not prejudice the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law. *American Dredging Co. v. Miller*, 510 U.S. 443 (1994).

Further, the FELA, 45 U.S.C. §51, *et seq.*, cases cited by petitioners are distinguishable because the Jones Act only incorporates the *statutory* provisions of FELA, and FELA has no *statutory* provision for jury trial. Moreover, the Texas litigation cited by petitioners is based on entirely different causes of action and the procedural rules of another state, and therefore, is distinguishable.

## I. Louisiana Uses the Exception of *Res Judicata* as a Screening Mechanism to Determine Whether the Case Should Proceed to Jury Trial on the Main Demand

Peremptory exceptions are procedural devices which allow the district court to adjudicate certain, discrete

issues before trial, including prescription, non-joinder of parties, no cause of action, no right of action, and *res judicata*. La. C.C.P. art. 927. Peremptory exceptions may be tried prior to trial, by the court, sitting without a jury, and the court may hear evidence and make factual determinations. La. C.C.P. art. 929, 931. Each peremptory exception is a complete bar to recovery. Therefore, when the court grants a peremptory exception, the court saves the judicial resources used in a full trial on the main demand.

It is well settled under Louisiana law that the proper procedural mechanism for asserting the defense of compromise or release is the peremptory exception of *res judicata*. *Brown v. Drillers, Inc.*, 630 So.2d 741, 747 (La. 1994); *Rivett v. State Farm Fire and Cas. Co.*, 508 So.2d 1356 (La. 1987); *Murphy v. Hoffpauir*, 540 So.2d 473 (La. App. 2d Cir. 1989). The peremptory exception of *res judicata* has been used to determine the validity of seamen's releases. *See, e.g., LeBlanc v. Callais Enterp. Part., Inc.*, 767 So.2d 823 (La. App. 5th Cir. 2000). A trial judge may determine, in advance of a jury trial on the merits, a peremptory exception of *res judicata,* even when factual evidence must be evaluated to make the determination. *Shell Oil Company v. Kennedy,* 344 So.2d 1153, 1154 (La. App. 4th Cir. 1977), *citing Babineaux v. Pernie-Bailey Drilling Co.,* 261 La. 1080, 262 So.2d 328 (La. 1977).

Petitioners argue that the trial court's hearing of the exceptions of *res judicata* would deny them the right to trial by jury afforded by the Jones Act. Notably, Louisiana has held that a judge trial of an exception of compromise does not deny plaintiff of his right to trial by jury on the main demand. *Shell Oil Company v. Kennedy,* 344 So.2d 1153 (La. App. 4th Cir. 1977); *citing Babineaux v. Pernie-Bailey*

*Drilling Co.*, 262 So.2d 328 (La. 1978); *Bowden v. State Farm Mut. Auto. Ins. Co.*, 150 So.2d 655 (La. App. 3rd Cir. 1963). Indeed, in *Shell*, the Fourth Circuit rejected the plaintiff's argument that factual issues as to the validity of a compromise were jury questions, concluding that "a plaintiff is not denied the right of trial by jury because [Louisiana's] procedural system requires or permits certain issues to be decided by the judge alone in advance of the trial." *Shell Oil*, 344 So.2d 1153 at 1154. Rather, the Court noted that Louisiana procedure "[utilizes] such devices as the peremptory exception to avoid the full-scale trial of actions which may be finally determined by the trial in advance of a conveniently separable issue." *Id.* If the exception is denied, the main demand is tried to the jury.

## II. Louisiana's Use of the Exception of *Res Judicata* is Consistent with Federal Maritime Law

Although the original petition was filed in Louisiana state court, there is no dispute that the substantive federal maritime law applies to the validity of these releases. Reasons and Order of the District Court, attached to the Petition, Appendix C, App. at 5; *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942). However, the exception of *res judicata* is a procedural device, and procedure is determined by state law.

As this Court has stated, a matter is procedural when it "does not bear upon the substantive right to recover, and is not a rule upon which maritime actors rely in making decisions about primary conduct – how to manage their business and what precautions to take." *American Dredging Co. v. Miller*, 510 U.S. 443, 454 (1994). A seaman

would have the same right to recover under the Jones Act regardless of whether a judge or jury determines the validity of his release; likewise, a defendant maritime employer would manage its business in the same fashion regardless of whether a judge or jury decided the validity of a release. Therefore, a trial court's decision to hear an exception of *res judicata* on a seaman's release is a procedural and not a substantive matter.

Extensive case law of this Court holds that, when it does not conflict with substantive maritime law, state courts may apply state procedures in adjudicating maritime actions under the "Saving to Suitors" clause. *See American Dredging Co. v. Miller*, 510 U.S. 443 (1994), *Madruga v. Superior Court of Calif.*, 346 U.S. 556 (1954), *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109 (1924). This Court held that, while a state may not provide for an *in rem* action in state court, "the State, having concurrent jurisdiction [under the "Saving to Suitors" clause], is free to adopt such remedies, and to attach to them such incidents, as it sees fit." *Red Cross Line*, 264 U.S., at 124 (holding that New York's Arbitration Law may be used to compel parties in an admiralty action). State procedure is to be applied in state courts unless it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Miller*, 510 U.S., at 447 (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917) (upholding Louisiana's rejection of the doctrine of *forum non conveniens*).

States are given relatively wide scope in terms of what is permissible state action in admiralty jurisdiction:

> Wherever the boundaries of permissible state regulation may lie, they do not invalidate state rejection of *forum non conveniens*, which is in two respects quite dissimilar from any other matter that our opinions have held to be governed by federal admiralty law: it is procedural rather than substantive, and it is most unlikely to produce uniform results.

*Miller*, 510 U.S., at 453. Thus, where a matter is procedural or does not necessarily require uniformity in application, state laws will apply.[5]

The exception of *res judicata* is exactly the type of proceeding that this Court has approved of in *Miller*. Petitioners have chosen to bring their case in state court; while substantive maritime law applies, this case is subject to state procedure, including the exceptions created under the Louisiana Code of Civil Procedure. Further, the use of the peremptory exception will not "work material prejudice to the characteristic features of the general maritime law" because the trial court will be bound by the

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[5] This is consistent with the general rule of conflicts that whether an issue is decided by the judge or a jury is determined by the law of the forum. *Restatement, Conflict of Laws* (Rev. 1988) §129; *Ettelson et al. v. Metropolitan Life Ins. Co.*, 137 F.2d 62, 64 (3rd Cir. 1943), *cert. denied*, 320 U.S. 777.

For example, in a diversity case in federal court, substantive questions are governed by state law, but which issues go to the jury is determined by federal law. *Simler v. Conner*, 372 U.S. 221, 222, 9 L. Ed. 2d 691, 83 S. Ct. 609 (1963) (whether the propriety of a lawyer's fee was an equitable issue for the judge or a legal issue for the jury was determined by federal standards); *Adams v. Johns-Manville Corp.*, 876 F.2d 702, 709 (9th Cir. 1989) (whether an issue of prior settlement goes to the jury or the judge decided based on federal standards of what is equity and what is law).

same legal standards under the Jones Act as a jury would be. The court will follow the federal substantive rules regarding the burden of proof and standard for determining whether a seaman's release is valid. *See* Reasons and Order of the District Court attached to the Petition as Appendix C, at App. 5; *Garrett v. Moore-McCormack Co. supra.* The applicants will have the opportunity to present all of their evidence regarding alleged fraud or coercion to the court, and the trial judge will apply federal maritime law to the issue of the plaintiffs' releases. Such a trial of the exception of *res judicata* would affect the plaintiffs' claims no more than a dismissal for *forum non conveniens* and, by the standards established by *American Dredging Co.*, trial of the exception preserves the characteristic features of maritime law and maintains its harmony and uniformity.[6]

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[6] Several decisions of Louisiana state courts also support this conclusion.

In *Milstead v. Diamond M Offshore, Inc.*, 676 So.2d 89 (La. 1996), the Louisiana Supreme Court noted that, even prior to *Miller,* it had held that the application of state procedural remedies in both general maritime cases and Jones Act cases. *See id.* at 94-95 (*citing Daigle v. Coastal Marine, Inc.*, 488 So.2d 679 (La. 1986)). *Milstead* involved a question of whether a Louisiana appellate court should use a Louisiana or federal standard in reviewing a Jones Act judge trial. The Louisiana Supreme Court held that the standard of appellate review is procedural and that use of the state standard did not prejudice the harmony or uniformity of maritime law. Moreover, in *Milstead,* the Louisiana Supreme Court extended the holding of *Daigle, supra,* and suggested that Louisiana courts of appeal should apply the state, rather than federal, standard of review in both general maritime and Jones Act jury trials. *Milstead,* 676 So.2d at 95. In so deciding, the Louisiana Supreme Court focused on two primary factors: first, that standards of review are procedural in nature; and, second, that standards of review are not characteristic features of general maritime law such that application of

(Continued on following page)

## III. Rules for Jury Trials Made by Judges in FELA Cases Are Not Incorporated in the Jones Act

Petitioners have based their argument that a jury must decide the exception of *res judicata* squarely on decisions interpreting the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §51, *et seq*. Petition at 8. Petitioners argue that the Jones Act, 46 U.S.C. §688, incorporates all provisions of FELA, including its judicial gloss. However, the Jones Act incorporates "all *statutes* of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees[.]" 46 U.S.C. §688. (emphasis added) Accordingly, the incorporation of FELA into the Jones Act is limited to the *statutory* provisions of FELA such as the abolition of contributory negligence and assumption of risk, and the gloss on those express statutory provisions. In contrast,

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Louisiana's standards of appellate review would interfere with the proper harmony and uniformity of general maritime law. *Id.*

More recently, the Louisiana Third Circuit Court of Appeal relied upon *Milstead* for the proposition that, while federal law is applicable to substantive issues in unseaworthiness and Jones Act cases, Louisiana appellate courts are correct to conduct their reviews under the applicable state law standard of review, manifest error. *Aycock v. Ensco Offshore Co.*, 833 So.2d 1246 (La. App. 3d Cir. 12/18/02).

Indeed, the application by Louisiana courts of the state standard of review in Jones Act cases was formerly even more significant, as Louisiana law provided for appellate review of fact as well as law. La. Const. art. 7, §§10, 29 (1921). To the contrary, under federal law appellate courts may not disturb the finding of a jury on the merits unless there appears to be no reasonable basis for the jury's finding. *Gallic v. Baltimore & Ohio R.R.*, 372 U.S. 108 (1963). Thus, the Louisiana standard controlled in spite of the fact that it differed considerably from the federal standard.

the right to jury trial in FELA cases in state court is *judge made* and, therefore, not incorporated into the Jones Act.

FELA contains no provision granting a right to a trial by jury. 45 U.S.C. §51, *et seq*. Instead, the right to a trial by jury in FELA cases in state court is entirely a judicial creation. In *Bailey v. Central Vermont R. Co.*, 319 U.S. 350 (1942), a FELA case, the issue was whether plaintiff had presented sufficient proof of negligence for the jury to find in his favor. The Supreme Court of Vermont held that the defendant/respondent was entitled to a directed verdict. *Id.*, at 350. This Court reversed that holding, finding that there was sufficient evidence to support the verdict, and stated that "To withdraw such a question from the jury is to usurp its functions." *Id.*, at 354. In explaining the decision, the Court quoted an earlier holding that "The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment." *Jacob v. New York*, 315 U.S. 752, 752 (1941) (reversing Federal District Court's dismissal of Jones Act complaint).

Later, in *Dice v. Akron, Canton & Y. R. Co.*, 342 U.S. 359 (1952), a FELA case from the Supreme Court of Ohio, the issue was not just whether a directed verdict was proper in the particular circumstances of the case, but to whom a question of settlement would be submitted in the first instance: the judge or the jury. This Court quoted *Bailey* that trial by jury was "part and parcel of the remedy afforded railroad worker under the Employer's Liability Act." *Id.*, at 363 (quoting *Bailey*, 319 U.S., at 354). Thus, *Dice* extended *Bailey* to create a new rule for jury

trials in FELA cases in state court.[7] The basis of *Dice* can only be a judicially created right peculiar to the circumstances of railroad workers and FELA. It clearly is not based on any statutory provision of FELA or an interpretation of any such statutory provision of FELA, and, accordingly, the rule of *Dice* is not incorporated into the Jones Act.

In contrast, the cases cited by petitioners holding that FELA jurisprudence is incorporated into the Jones Act deal exclusively with issues of *liability* explicitly addressed in *statutory* provisions of FELA. *Kernan v. American Dredging Co.*, 355 U.S. 426, 432-33 (1958) (Jones Act incorporates case law on FELA provision, 45 U.S.C. §54, holding employer negligent due to statutory violation); *Cox v. Roth*, 348 U.S. 207, 209 (1955) (interpreting FELA provision, 45 U.S.C. §57, allowing for suits against receivers as allowing a Jones Act suit against the survivor of a tortfeasor); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990) (seaman's cause of action under Jones Act survives to his personal representative by incorporating FELA provision 45 U.S.C. §59); *Engel v. Davenport*, 271 U.S. 33, 38-39 (1926) (incorporating FELA's two year statute of limitations into Jones Act, from former §6 of FELA); *Hopson v. Texaco, Inc.*, 383 U.S. 262, 263-64 (1966) (Jones Act incorporates FELA case law on definition of "agent" as used in 45 U.S.C. §51); *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 324 (1927) (§1 of FELA was incorporated into the

[7] The *Dice* decision has been criticized by several state courts hearing FELA cases. *See, e.g., Ex parte: Burlington Northern R. Co.*, 470 So.2d 1094, 1097 (Ala. 1985).

Jones Act and supplanted the rule from *The Osceola*, 189 U.S. 158 (1903)).[8]

Indeed, FELA and the Jones Act differ substantially on other non-statutory issues. The issue of releases under the Jones Act and FELA is particularly pertinent here. A FELA railroad worker attacking the validity of his release bears the burden of proving the release to be invalid. *Callen v. Penn. R. Co.*, 332 U.S. 625 (1948). In *Callen*, this Court held that "until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted." *Id.*, at 630. In this specific area where there are no statutory provisions of FELA, Jones Act jurisprudence from this Court has established a substantially different legal standard. Under the Jones Act, the party seeking to enforce a seaman's release bears the

[8] The only case cited by petitioners addressing an issue not specifically included in the statutory language of FELA is *Miller*, although the reference to FELA is dicta. This Court, having already determined that Louisiana's rejection of *forum non conveniens* was not in conflict with general maritime law, also noted that the same result had been reached under FELA. *Miller*, 510 U.S., at 456. This Court cited *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 5 (1950), which itself simply held that there was nothing in FELA that would compel a state to reject its own doctrine of *forum non conveniens*. Thus, both *Mayfield* and *Miller* simply found that there were no provisions in either FELA or the Jones Act that would affect a state's doctrine of *forum non conveniens*; this is hardly an importation of a judicial gloss regarding a non-statutory issue.

burden of proof in asserting the validity of a release. *Garrett v. Moore-McCormack*, 317 U.S. 239, 248 (1942).

It is clear from the jurisprudence of this Court that, when FELA is silent on a particular point, there may be variation between the legal standards applied to FELA and Jones Act cases. Therefore, the Jones Act only incorporates statutory provisions of FELA and FELA jurisprudence on non-statutory issues is not controlling in Jones Act cases. Accordingly, *Dice* is not controlling in this case.

## IV. The Texas Litigation Arising from the Capsize of the DLB-269 is Distinguishable Because the Causes of Action and State Procedures Are Different

The decisions of the Texas courts to which petitioners refer, Petition at 12, are distinguishable. 46 U.S.C. §688(b) bars foreign oil field workers on the outer-continental shelf of foreign countries from bringing claims under the Jones Act, the General Maritime Law, or state law. Section 688(b) applies to the plaintiffs in the Texas proceedings, and, accordingly, they have brought their claims under Mexican law. *Stier v. Reading & Bates Corp., et al.*, 992 S.W.2d 423 (Tex. 1999). Therefore, the Jones Act is not involved, and the two cases are distinguishable.

Further, the trials conducted in Texas were on the plaintiffs' main demands, not an exception of *res judicata*. In addition, there is the obvious difference that the Texas cases are brought in Texas state court and are subject to Texas procedural rules. If Texas chooses to grant a jury trial to the plaintiffs there, it can have no effect on petitioners who chose to bring their cases in Louisiana state court.

## V. Petitioners Raise a Narrow Issue Which Affects Them Only

Petitioners base their request for a writ of certiorari on an alleged conflict between a state procedure for determining the validity of a release and this Court's 1952 decision in *Dice*. Yet, petitioners cite no case in which such a conflict has arisen in the 52 years since *Dice* was decided. It, therefore, is obvious that the issue raised by petitioners is important to them only and that it lacks any of the factors necessary to be worthy of a writ of certiorari from this court. U.S.S.C. Rule 10.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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February 3, 2004